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IN THE

Supreme Court of the United States

October Term, 1954

No. 744

THOMAS J. VANDYKE, *Petitioner*

versus

BLUEFIELD GAS COMPANY, a corporation, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN SUPPORT INCORPORATED

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May 3rd, 1954

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In The

SUPREME COURT OF THE UNITED STATES

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No. ————————

THOMAS J. VANDYKE, *Petitioner*

vs:

BLUEFIELD GAS COMPANY, *Respondent*

a corporation,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Thomas J. VanDyke, prays that a writ of certiorari issue to review the judgment entered in this case on February 16th, 1954, by the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The District Court did not render an opinion. The opinion of the Court of Appeals (R. 95-99) is reported at 210 F. (2d) 620.

JURISDICTION

The judgment of the Court of Appeals was entered February 16th, 1954 (R. 99-100). The jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code, (Act June 25th, 1948, c. 646, Sec. 1; 62 Stat. 928; 28 U. S. C. A. 1254 (1)).

STATUTES INVOLVED

The pertinent provisions of the *Fair Labor Standards Act of* 1938, as amended, (29 U. S. C. A. 201, et seq; Act June 25th, 1938, c. 676, 52 Stat. 1060, amended, Act October 26th, 1949, c. 736, 63 Stat. 910) and of the *Portal-to-Portal Act* (29 U. S. C. A. 251, et seq; Act May 14, 1947, c. 52; 61 Stat. 84) are set forth in the Appendix, infra, pp. 17-18.

QUESTIONS PRESENTED

1. Whether an employee of a gas company, in sole charge of the company's business during a fourteen hour period each night, but who is, in a portion of the period, permitted to sleep when convenient and when not actually engaged in the duty of watching for prowlers, and receiving and acting on telephone trouble reports and service requests, is entitled under provisions of the *Fair Labor Standards Act*, to compensation for all hours required to be spent on the premises.

2. Whether, in the event part of the hours in such employment required to be spent on the premises each night may be considered excluded noncompensable time, the employer's right to claim such exclusion is conditioned upon furnishing such employee safe, clean, comfortable and otherwise adequate sleeping facilities.

3. Whether, if such time is compensable as a matter of law because of employer's failure to furnish safe and adequate sleeping facilities, the failure of an employee to complain of, or protest, the lack of safe, clean, comfortable and otherwise adequate sleeping facilities may be taken as a waiver or release of his right to compensation for such hours.

4. Whether, in a case wherein liability is found under Sections 6 and 7 of the Act (29 U.S.C.A. 207), the employer's mere belief that it was not violating the Act is sufficient, under provisions of Section 11 of the *Portal-to-Portal Act* (29 U.S.C.A. 260), to justify the denial of the award of liquidated damages provided in Section 16 (b) of the Act (29 U. S. C. A. 216 (b)).

STATEMENT

This action was instituted by petitioner in the District Court for Southern West Virginia, to recover wages claimed to be due from respondent under provisions of the *Fair Labor Standards Act of* 1938, as amended (29 U.S.C.A. 201, et seq). Petitioner was employed by respondent during the period from August 11th, 1951 to April 15th, 1953.

Respondent is one of a group of commonly owned and controlled corporations which sell and distribute natural gas in the cities of Bluefield, West Virginia and Bluefield, Virginia, sell and deliver bottled gas in a larger territory of the two states, and sells, installs and services gas appliances in the same areas. Its natural gas is purchased, under authority of the Federal Power Commission from Amere Gas Utilities Company, which supplies respondent from wells located neither in West Virginia nor Virginia, (See Petitioner's Original and Supplemental Interrogatories and Answers thereto, made a part of the record below).

Petitioner was employed during the hours of 5:00 P. M. and 7:00 A. M. each night, seven days a week, or 98 hours per week, at a salary of $150.00 per month (or $34.61 per week). He was required to remain, during those hours, on the premises of respondent's service plant in Bluefield, West Virginia, to watch for and report disturbances and to wait for, receive, act on and relay telephoned reports of trouble or service requests relating to the business of respondent and all of its affiliated companies (R. 44-45), the service plant being the only place at which telephone communications at night, concerning all of the companies, were received (R. 44-45). Petitioner was alone and in sole charge during those hours. Respondent's report forms, and the evidence, indicate petitioner's duties to be that of night-watchman (R. 13; 28-29; 49-50; 15) but his principal duty was that of night telephone clerk or operator. While respondent admitted that petitioner's duties were the same, except for the volume of calls received after 10:00 P. M., during the entire night (R. 48-49), that petitioner was required to

stay, during the 14 hours each night, in the service plant (R. 44; 16; 20-21), and that petitioner's presence at the plant between the hours from 10:00 P. M. to 7:00 A. M. were essential and of benefit to the respondent's business, and of its affiliated enterprises, (R. 52-53), it intended to pay petitioner *only for his hours on duty from* 5:00 *P. M. to* 10:00 P. M. each night, or for 35 *hours* per week, for the weekly compensation of $34.61 (R. 48-49; 12; 50-52). Petitioner, a man 58 years of age, did not know what his pay was to be until he received his first pay check (R. 23-24) and thereafter asked for, but did not get, a raise in pay (R. 24; 44; 68). Petitioner testified, without dispute, that respondent once tried to increase his daily duty hours from fourteen to fifteen and one-half hours, without a change in pay, but on petitioner's objections, abandoned that plan (R. 23).

The Court found that petitioner was authorized to sleep when he desired after 10:00 P. M. each night (R. 93; 3) on an iron bed located near a wall telephone in a record and supply storage room in respondent's service plant.

Petitioner was able to get naps amounting, on average, in the five warm months, to not more than four hours per night (R. 21-22) and in the seven colder months, when room heat was necessary, to not more than three hours per night (R. 22), but seldom had any long periods after 10:00 P. M. of *uninterrupted or untroubled sleep* (R. 21-22)

Respondent assigned petitioner duty quarters, consisting of a 12x14 unkept, dirty storage room, off the main offices and shop rooms, filled full and high with old records and company equipment, in a small space of which was located an iron, flat-springed bed, on which was an uncovered dirty mattress, and an old-type manually operated, open flame, unvented gas burner, without pilot light and automatic safety controls, which, because of lack of space, was located not more than three feet from the bed (R. 16-20; 26; 29-40; 43; 54-55). A telephone was located on the wall near the bed. Old records, in boxes, were stacked so high, one window was blocked (R.

19; 33-34; 43). A room nearby had a wash bowl and commode, but the bath tub was disconnected (R. 17-18; 38-39). One witness, who had eight years experience repairing and installing gas appliances for respondent, testified that the heater, because open flamed, close to the bed, unvented and without automatic safety controls was dangerous for use in a room used for sleeping purposes (R. 35; 40-41). The gas code of the City of Bluefield proscribed the installation of such heaters in sleeping rooms (R. 41; 46-47; 57-58), and petitioner was afraid of it (R. 19; 21). Respondent's general manager testified that providing petitioner a *safe place to sleep* was not part of the employment agreement (R. 49).

Respondent says no sheets, blankets, or pillows were furnished because " that would create a problem in laundry and this and that" (R. 41-42) but plaintiff, in winter, used a blanket, and in summer, a light counterpane, brought from his home (R. 16-18; 30-31; 33-34) and furnished his own pillow (R. 18). Petitioner took naps at night fully dressed, except for removal of his shoes (R. 39; 20). Respondent's janitor was required to clean other rooms in the building *but not petitioner's duty room* (R. 54; 38; 45; 24), and it was constantly dirty (R. 30: 32, 42-43; 38; 54; 85).

A radio, belonging to another employee, was located in another room but could not be used in petitioner's duty room (R. 55; 17; 20). No cooking facilities were provided, petitioner usually eating at home or, on a few occasions, having his wife or daughter bring food to him at the plant.

During the period *after March,* 1952, as to which respondent *kept records* (R. 52-53), calls received and acted on by petitioner after 10:00 P. M. were not numerous. Because of system trouble, calls prior to March, 1952, received after 10:00 P. M., were somewhat more numerous (R.21). Petitioner was not paid for any duties performed after 10:00 P. M. or for more than thirty-five hours per week (R. 48-49; 25).

During the entire period of employment, petitioner

and other of respondent's employees, had telephones at home (R. 22-23; 31; 45-46), a fact known to respondent's general manager (R. 46). Petitioner never used any time on duty for the transaction of personal affairs.

Respondent, through testimony of an officer-stockholder, offered proof that it believed and concluded, from an alleged study made in 1951, that neither respondent nor petitioner were covered by the *Fair Labor Standards Act* (29 U. S. C. A. 201, et seq), being of the belief (1) *that respondent was not engaged in interstate commerce,* and (2) that petitioner's duties were not such as to make him a covered employee, even if the respondent were a covered employer (R. 58-60; 92-93). This officer could not recollect whether he had studied the decisions of this Court in *Kirschbaum vs Walling,* 316 U.S. 517, 62. S. Ct. 1116 and *Walton vs Southern Package Co.,* 320 U. S. 540, 64 S. Ct. 320 (R. 60).

Upon these facts the District Court found (1) that since petitioner was provided "with a room in which to sleep" and "a — *safe and comfortable bed* and other equipment,*and quarters,* on which to sleep", though "arrangements" were made by which *petitioner* was to provide his own bed clothing, petitioner was not entitled to compensation for six of the fourteen hours in each night which he ought to have slept, and was, therefore, entitled to judgment only for sixteen uncompensated hours per week in excess of the forty hour statutory maximum, and (2) that respondent's "good faith conclusion that the Wage and Hour Law did not apply" warranted a denial of any liquidated damage award provided by Section 16 (b) of the Act (29 U. S. C. A. 216 (b)), under Section 11 of the *Portal-to-Portal Act* (29 U. S. C. A. 260) (R. 2-7).

After overruling petitioner's motion to modify and review its findings (R. 1; 8-10), the District Court entered judgment for petitioner only for actual wages due, at overtime rate, for the hours in excess of forty hours and not exceeding fifty-six hours of each full ninety-eight hour week, amounting to $1,722.00, with costs and attorney fee, (R. 1-2).

Petitioner appealed, assigning as error the Court's refusal (1) to allow petitioner judgment for wages for the full ninety-eight hours per week required to be spent on respondent's premises, (2) to award liquidated damages upon the liability found, and (3) to award an reasonable attorney fee. Respondent did not appeal.

The Court of Appeals affirmed all the findings and conclusions reached by the District Court (R. 95-99), except the findings relating to the adequacy, comfort and safety of sleeping facilities furnished (R. 98). The Court, instead, apparently grounded its decision respecting respondent's failure to furnish safe, adequate and decent facilities upon petitioner's accession "without apparent protests" to the arrangement that he furnish his own bed clothes, and the fact that petitioner "never made any complaint—about the facilities given to him", such as the "lack of a bath tub,—the dangerous type of heater furnished and—the general dirtiness of the quarters" (R. 98).

SPECIFICATIONS OF ERROR TO BE URGED

The Court of Appeals erred:

1. In holding that six light duty, standby hours of the fourteen hours in each night that petitioner was required to be on duty in employment of this nature, on respondent's premises, are not compensable time under provisions of Section 6 and 7 of the *Fair Labor Standards Act* (29 U. S. C. A. 206 and 207), it has decided a question of importance in a manner in conflict with a decision of the Court of Appeals for the Eight Circuit, and contrary to the interests of justice.

2. In holding that, nothwithstanding respondent's failure to furnish petitioner safe, adequate and decent sleeping quarters, bedding and facilities, the six light duty, standby night hours, were not compensable time under the Act, it has decided a question of importance in a manner inconsistent with decisions of this Court, and contrary to the interests of justice.

3. In holding that petitioner's failure to complain of

the lack of safe, adequate and decent sleeping facilities constituted a waiver or release of petitioner's right under the Act, to compensation for six light duty, standby hours in each night, it has decided a question of importance in a manner inconsistent with a decision of this Court, in conflict with the holdings of other circuits, and contrary to the interests of justice.

4. In holding that respondent's showing of mere belief that it was not violating the provisions of Sections 6 and 7 of the Act (29 U.S.C.A. 206 and 207), warranted the denial of the liquidated damage award required by Section 16 (b) (29 U. S. C. A. 216 (b)), under provisions of Section 11 of the *Portal-to-Portal Act* (29 U. S. C. A. 260), it has decided an important question of Federal law in a manner in conflict with, and as to which there is confusion in, decisions of the Courts of Appeals of various circuits, state appellate and trial courts, and contrary to the interests of justice, and which has not been, but should be, settled by this Court.

5. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The Court's holding that an employee whose duties require him to remain alone, on his employer's premises, in charge of its business for a fourteen hour period each night to watch for intruders and to wait for, receive and take action on gas system trouble reports and service requests is not entitled to compensation for that part of the time during which actual duties were light and in which he was authorized to rest, is erroneous, is in direct conflict with the decision of the Court of Appeals for the Eighth Circuit, in *Central Missouri Tel. Co. vs Conwell,* (CA 8), 170 F. (2d) 641, and implicitly conflicts with this Court's holding in *Missouri, K. and T. Ry. Co. vs* U. S., 231 U. S. 112, 34 S. Ct. 26; *Skidmore vs Swift and Co.,* 323 U. S. 134, 65 S. Ct. 161; *Armour and Co. vs Wantock,* 323 U. S. 126, 65 S. Ct. 165, which hold that, except in the case of (a) twenty-four hour duty employees, as to which (b) the Administrator has promulgated regulations permitting exclusion of designated un-

interrupted sleeping time and (3) who were paid for duties performed during designated sleeping time, an employee who is *employed to wait* on an employer's premises, rather, than merely waiting to be employed, is entitled to compensation for the full number of hours required so to be spent exclusively for his employer's benefit.

This exception to the general rule of compensability under Section 6 and 7 of the Act (29 U. S. C. A. 206 and 207), which is applied to twenty-four hour duty employees, as to whom reasonable regulations respecting exclusion of permitted idle time designated for normal uninterrupted sleep were promulgated recognized in the *Wantock* and *Skidmore* cases, supra, and in the cases of *Bowers vs Remington Rand Co.,* (CA 7), 159 F. (2d) 114, *Rokey and Day vs Zimmerman,* (CA 8) 157 F. (2d) 734; and *Bell vs Porter,* (CA 7) 159 F. (2d) 117, all involving firemen, and applied by the Court below, is clearly not applicable to employees whose occupations and duties are not of closely similar nature. *Central Missouri Tel. Co. vs Conwell* (CA 8) 170 F. (2d) 641.

The Court of Appeals for the Eighth Circuit, which had previously applied the exception respecting firemen in *Rokey and Day vs Zimmerman,* supra, correctly distinguished it from the different situation presented with respect to eleven hour shift telephone operators in *Central Missouri Tel. Co. vs Conwell,* supra. Examination of the *Conwell* case will disclose a fact situation closely similar to that in this case. Indeed, if anything, the facts in this case warrant even more strongly the application of the general rule of total compensability than do those in the *Conwell* case, since petitioner (a) had additional guard duties (b) was *alone in sole charge of, and responsible for, respondent's utility system* and affiliated systems and enterprises the entire fourteen hours spent each night on the premises.

As in the *Conwell* case, petitioner was "required to be in (the service plant) ready to serve — rendered — necessary service for which (he) confessedly received no compensation (after 10 P. M.) — (and) was not there for

the purpose of sleep nor for any purpose of (his) own, but for (his) employer's benefit". And he was "charged with (*sole*) responsibility for — the (enterprises) under (his) charge". Clearly, the holding of the Court below conflicts with the right and just decision of the Court of Appeals of the Eighth Circuit, which applies the general rule of compensability, consonant with the clear purpose and intendment of Sections 6 and 7 of the *Fair Labor Standards Act.*

In *Dumas vs King,* (CA 8) 157 F.)2d) 463, 467, the same Court earlier recognized and applied the rationale of the *Wantock* and *Skidmore cases,* supra, that the principal test of compensability for idle time is whether the employee *is employed to wait on the premises of the employer.*

The cases of *Super-Cold Southwest Co. vs McBride,* (CA 5) 124 F. (2d) 90, and *Howard vs Southern Bell Tel. Co.,* 72 F. Supp. 276, cited by the Court below, are clearly distinguishable from the instant case because the employees in those cases *were not required to remain on the employer's premises.*

2. The Court's holding that petitioner must be considered to be *within the exception to the general rule* of full compensability for hours employees are employed to wait on the employer's premises, which has been *applied only to twenty-four hour duty employees such as firemen,* conflicts with the holding of this court implicitly conditioning exclusion of compensation for night duty hours upon (1) the employer furnishing safe, adequate and decent sleeping facilities and (2) compensating him for time within the designated sleeping period actually spent at work.

The Court of Appeals (R. 98), and the record, indicate only that respondent furnished petitioner "a room with a bed, heater and telephone", that *petitioner,* "without apparent protest" furnished "his own bed clothes" and that "it is quite significant that, —, (petitioner) never made any complaint to his employer about the facilities given to him" viz: *"the lack of a bath tub, — the dangerous*

The decision below apparently also conflicts with the recent decision of the Ninth Circuit in *General Electric Co. vs Porter,* (CA 9) 208 F. (2d) 805, Certiorari Denied April 26, 1954, 74 S. Ct. 676.

type of heater furnished, and — *the general dirtiness of the quarters*". That safe, adequate and decent sleeping facilities were not furnished petitioner is clear from the opinion below (R. 98) and the record.

The exclusion of compensation for hours of designated sleeping time, even in the case of twenty-four hour duty firemen as to whom the Administrator has made an exception by special regulations respecting idle time, is clearly conditioned upon the showing that the employer provided adequate, clean, safe and reasonably comfortable sleeping facilities in which to take a "normal night's sleep". *Skidmore vs Swift and Co.*, supra; *Armour and Co. vs Wantock*, supra.

The Court below cited *Bell vs Porter*, supra, in which sleeping time compensation was denied, as authority for the broad general proposition that this Court, in denying certiorari thereto (Cert. granted 330 U. S. 817, Vacated 330 U. S. 813, Rehearing denied 331 U. S. 864), "has upheld, however, the rule that sleeping time is not compensable", (R. 97). Not only is the denial of a writ by this Court not a "holding", but the facts in that case, *involving firemen* on twenty-four hour duty who are excepted from the general rule, and that the court below *"did not find* that sleeping quarters were inadequate or of such character — that — (the firemen were) unable to obtain normal rest" and that they were furnished "sleeping facilities, *bedding, clothes lockers, showers,* toilet facilities and *laundry service for bedding"*, supported the court's denial of compensation for sleeping time, and, being consistent with the decisions this Court, justified denial of the writ.

Consequently, the holding of the court below that, notwithstanding the respondent's failure to furnish petitioner safe and comfortable sleeping quarters and facilities, required as a condition of excluding designated sleeping time from hours ordinarily to be counted compensable under Section 6 and 7 of the act, even in the special class of firemen, conflicts with the holdings of this Court in *Skidmore vs Swift and Co.* and *Armour and Co. vs Wantock*, supra, which implicitly condition

or predicate the application of the exception to the general rule of compensability upon the employer's furnishing adequate sleeping facilities, and, if allowed to stand in a case such as this, would permit employers, simply by designating time as "sleeping time", to avoid compensating any and all types of employees required to remain on their premises at night.

3. The Court's holding that petitioner's failure to complain of the lack of safe, adequate and comfortable sleeping facilities, amounts to a waiver or release of his right to claim compensation for all idle night hours on the premises, conflicts with the holding of this Court in *Brooklyn Savings Bank vs O'Neil,* 324 U. S. 697, 65 S. Ct. 895, which proscribed the release by an employee of claims arising under Sections 6, 7 and 16 (b) of the Act (29 U. S. C. A. 206, 207 and 216 (b)).

The Court below, conceding that adequate facilities for sleeping were not provided, grounded its denial of compensation for the idle night hours upon petitioner's agreement, "without protests, to *furnish his own bedding*" and that he "never made any complaint to his employer" about the *"lack of a bath tub,* — the *dangerous type of heater* furnished, and — the *general dirtiness of the quarters"* (R. 98). In other words, the court below holds that petitioner, by agreement, inaction or failure to complain, waived or released his right to, or is estopped to claim, compensation for idle hours, in lieu of decent, safe and comfortable sleeping facilities. Even if the exception to the general rule of compensability for hours employed to wait on the employer's premises, applicable to firemen, is applicable to petitioner it is clear that an employer must either pay for such time or provide safe, comfortable and decent sleeping facilities. It follows that only if the right to compensation under Sections 6 and 7 of the Act can be waived or released, can the right to adequate sleeping facilities in lieu thereof be waived or released. See also *Tennessee Coal and Iron Co. vs Muscoda Local,* 321 U. S. 590, 602, 64 S. Ct. 698, 705.

This Court's holding in *Brooklyn Savings Bank vs O'Neil,* supra, prior to the passage of the *Portal-to*

Portal Act (29 U. S. C. A. 251, et seq), that an employee could not release or otherwise relinquish any benefit to which he was entitled under provisions of Section 6, 7 and 16 (b) of the *Fair Labor Standards Act* short of full payment was modified by Section 3 of the *Portal-to-Portal Act* (29 U. S. C. A. 253) only to the extent of validating express compromise settlements and releases affecting the right to "*liquidated damages* provided in Section 16 (b) of the *Fair Labor Standards Act* (29 U. S. C. A. 216 (b)). Moreover, the language of Section 3 (c), (29 U. S. C. A. 253 (c)) providing that "such compromise or waiver, —, shall, *according to the terms thereof,* be a complete satisfaction, — and bar —", clearly indicates that even with respect to the right to liquidated damages, an express written waiver or compromise instrument still is required.

In *Handler vs Thrasher,* (CA 10) 191 F. (2d) 120, decided in 1951, the principle of the *O'Neil* case was followed, the Court holding that even though the employee expressly agreed that he would not demand overtime pay, such an agreement being in contravention of Section 7 of the *Fair Labor Standards Act* (29 U. S. C. A. 207), was invalid and the employee "cannot be estopped by its provisions".

Since, therefore, implied waivers or releases of benefits of the Act, are not embraced in, or validated by, Section 3 of the *Portal-to-Portal Act* (29 U. S. C. A. 253), the rule announced by this Court in *Brooklyn Saving Bank vs O'Neil,* supra, is still subsisting law, as to which the holding of the Court below clearly conflicts.

4. The Court's holding that Section 11 of the *Portal-to-Portal Act* (29 U. S. C. A. 260) warranted the denial of liquidated damages provided under Section 16 (b) of the *Fair Labor Standards Act* (29 U. S. C. A. 216 (b)), equal to the wages found due under Sections 6 and 7 of the Act (29 U. S. C. A. 206 and 207), upon respondent's mere claim of good faith involves an important question of Federal law as to which there is confusion and conflict among the appellate courts, and which this Court has not, but should, decide.

Section 11 of the *Portal-to-Portal Act* (29 U. S. C. A. 260) provides that a court may "in its *sound* discretion" deny an award of liquidated damages provided under Section 16 (b) of the *Fair Labor Standards Act* (29 U. S. C. A. 216 (b)) if the "employer shows to the satisfaction of the court that the—omission—was in good faith *and* that he had reasonable grounds for believing that his—omission was not a violation—" of the Act.

The *trial court* found that liquidated damages should not be awarded because respondent "went into this matter and secured advice" of a person not a lawyer (R. 60) and "came to a good faith conclusion that the Wage Hour Act did not apply". (R. 7). *The court below* approved denial of liquidated damages only upon the testimony of an officer and stockholder of respondent, that he believed petitioner was not a covered employee (R. 98).

The only evidence offered in support of the Court's exercise of the discretion reposed in it by Section 11, was the testimony of this officer-stockholder of respondent that *he alone* (R. 60) made a study, in 1951, of petitioner's job and duties, and concluded (1) that the respondent, who buys its gas, by permission of the Federal Power Commission, from an interstate gas company, *distributing and selling it* through a connected system *in the two states of Virginia and West Virginia,* was not in interstate commerce and (2) that if in interstate commerce, the petitioner's duties did not make him a covered employee.

The respondent's first "conclusion" was obviously incredible, and, in view of this Court's clear and unambiguous holdings in the landmark employee-coverage cases of *Kirschbaum vs Walling,* 316 U. S. 517, 62 S. Ct. 1116 (1942) and *Walton vs Southern Package Co.,* 320 U. S. 540, 64 S. Ct. 320 (1944), the second "conclusion" is hardly more credible. Respondent's witness couldn't recollect whether he had studied either of those cases. (R. 60).

Since the good faith of respondent must be grounded upon this study of employee coverage, this officer (1)

either did not make a study which inevitably would have led to these decisions and, therefore, misled the trial court, or if he made the study, found the cases and, from them, must have known that the petitioner's employment clearly was covered or, at least, assumed the risk of error. In either event, respondent could not have acted in good faith, so that the trial court's finding, approved by the court below, that respondent has shown good faith, being without any support, constituted an abuse of the *sound* discretion reposed in the court.

Moreover, the statute requires a showing of employer's good faith *and reasonable ground* for belief in his innocence of violation of the Act. Consultation with one, not trained in law, and who "concluded nothing" (R. 60) is, as the Court of Appeals recognized, obviously not reasonable ground for belief in compliance with the *Fair Labor Standards Act.*

Furthermore, there is positive evidence of respondent's lack of good faith in its admission, that, for the period from August 11th, 1951 to March 15th, 1952, (R. 52; 11) it kept no records of petitioner's employment, in violation of Sections 11 (c) and 15 (a) (5), of the Act (29 U.S.C. A. 211 (c), 215 (a)(5)), and the showing that on January 19th, 1953, it attempted a ruse designed to prejudice petitioner's claim (R. 12; 50-52).

This Court has not yet had occasion to construe Section 11 of the *Portal-to-Portal Act* (29 U. S. C. A. 260), and there is general confusion respecting the strictness or liberality with which it is to be applied, among the decisions of the various appellate courts. Some decisions of appellate courts and trial courts, and of the court below, simply approve the denial or award of liquidated damages without serious consideration, which is establishing a general pattern reposing *absolute* discretion in trial courts, *Brown vs Dunbar,* (CA 2) 189 F. (2d) 871; *Central Missouri Tel. Co. vs Conwell,* (CA 8), supra; *Rothman vs Publicker Ind.,* (CA 3) 201 F. (2d) 618; *Addison vs Huron Stevedoring Corp.,* (CA 2) 204 F. (2d) 88; *Tripp vs May,* (CA 7), 189 F. (2d) 198 while others deal with the subject with varying degrees of

strictness, or apply different standards. *Lassiter vs Atkinson,* (CA 9) 176 F. (2d) 984; *Landaas vs Canister,* (CA 3) 188 F. (2d) 768.

If a trial court may deny award of liquidated damages merely on the assertion of an employer that he acted in good faith and that in his opinion he had reasonable grounds for believing in his innocence of violation of the Act the statutory "sound discretion" has been, or will soon be converted in practice, to "absolute discretion" leading to practical repeal of the liquidated damage provision (Section 16 (b)) of the *Fair Labor Standards Act,* which from its legislative history and terms, it is obvious was not the legislative object sought in the enactment of Section 11 of the *Portal-to-Portal Act.*

Moreover, since judgment for interest, ordinarily chargeable upon other liquidated contractual demands, is not permitted upon judgments for wages due under provisions of Sections 6 and 7 of the *Fair Labor Standards Act, Brooklyn Savings Bank vs O'Neil,* supra, liquidated damage awards under provisions of Section 16 (b) of the *Fair Labor Standards Act* should be denied, under provisions of Section 11 of the *Portal-to-Portal Act,* only upon strict and substantial proof supporting both of the statute's requirements of employer "good faith" and "reasonable ground".

Whether the Court below erred in approving the denial of the award of liquidated damages, and we contend that it did, or whether it was right, it is submitted that this Court should take this opportunity to furnish guidance and standards under which the "sound discretion" reposed by the statute should properly be exercised.

CONCLUSION

For any or all of the reasons stated, it is respectfully submitted that a writ of certiorari should be granted.

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May 3rd, 1954.

APPENDIX

Section 16 (b), *Fair Labor Standards Act* of 1938, as amended (29 U. S. C. A. 216):

"(b). Any employer who violates the provisions of Section 6 or Section 7 of this Act (Sections 206 or 207 of this title) shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in additional equal amount as liquidated damages.—".

Section 3, *Portal-to-Portal Act* (29 U. S. C. A. 253):

"(a) Any cause of action under the Fair Labor Standards Act of 1938, as amended, — may hereafter be compromised in whole or in part, if there exists a bona fide dispute as to the amount payable by the employer to his employee; *except* that no such — cause of action may be so compromised to the extent that such compromise is *based on an hourly wage rate less than the minimum required under such Act, or on a payment for overtime at a rate less than one and one-half times such minimum hourly wage rate.*

* * * * *

(c) Any such compromise or waiver, —, shall *according to the terms thereof,* be a complete satisfaction — and — bar to any action —."

Section 11, *Portal-to-Portal Act* (29 U. S. C. A. 260):

"260. Liquidated Damages. — In any action commenced — to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938 —, *if the employer* shows to the satisfaction of the court that the — omission giving rise to such action was in *good faith and that he had reasonable grounds* for believing that his — omission was not a violation of (the Act), the court

may, in its sound discretion, award no liquidated damages or award (any amount less than) specified in Section 16 (b) of such Act."